Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INTERNATIONAL WOODWORKERS OF AMERICA, U.S., AFL-CIO, and its LOCAL NO. 5-15,
Petitioner,

vs.

WEYERHAEUSER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When an arbitrator has resolved a labor-management grievance by reliance on contract language that he holds to be unambiguous, may the Court of Appeals vacate the arbitration award because it believes the language to be ambiguous, and order a remand for evidence on bargaining history and past practice?

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PETITION FOR A WRIT OF CERTIORARI

The International Woodworkers of America, U.S., AFL-CIO, and its Local No. 5-15 respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinions of the court of appeals and the district court, the report of the magistrate judge, and the award of the arbitrator appear in Appendix A. The opinion of the court of appeals is reported at 7 F.3d 133 (8th Cir. 1994).

JURISDICTION

The court of appeals by 6 to 3 denied petitioners' petition for rehearing on January 11, 1994, and this petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides, in relevant part, that "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

On July 24, 1991, Arbitrator Barnett M. Goodstein rendered a decision in favor of the International Woodworkers of America, U.S., AFL-CIO, and its Local No. 5-15 [hereinafter collectively the union]. Arbitrator Goodstein had been charged with deciding whether the Weyerhaeuser Company [hereinafter the employer] had violated the collective bargaining agreement between the parties by ceasing to pay its Wright City, Oklahoma maintenance employees for their half-hour lunch period.

The arbitrator ruled that the employer had violated the collective bargaining agreement. The arbitrator's decision was based upon his interpretation of Article XI, Section I of the agreement, which he expressly held to be unambiguous.

On October 25, the union filed an action in the United States District Court for the Western District of Arkansas to enforce the arbitration award. On December 9, the employer counterclaimed, requesting that the award be vacated.

The parties filed cross-motions for summary judgment. On August 28, 1992, United States Magistrate Judge Charles G.

Vaccaro issued a report recommending that both motions for summary judgment be denied because a genuine issue of material fact existed. After the union and the employer filed responses to the magistrate judge's report, United States District Judge Bruce M. Van Sickle granted the union's motion for summary judgment and ordered that the arbitration award be enforced.

The court found that the award concerned the construction of the contract and thus the court had no business overruling the arbitrator. After Judge Van Sickle denied the employer's motion to set aside the judgment, the employer appealed to the United States Court of Appeals for the Eighth Circuit.

On October 12, 1993, the Eighth Circuit issued its opinion vacating the arbitrator's award. The court disagreed with the arbitrator about whether the crucial contract language was ambiguous, and found ambiguity that could be resolved only by considering the parties' bargaining history and past practices.

The union's petition for rehearing and suggestion for rehearing en banc were denied. Chief Judge Arnold, Judge McMillian, and Judge Morris Sheppard Arnold would have granted the suggestion, and Judge John R. Gibson took no part in the decision.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OF THE OTHER COURTS OF APPEAL

The rule for court review of the decision of a labor-management arbitrator is simple and well-established. In a seminal decision over thirty years ago:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.
>
> . . . .
>
> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns the construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596, 599 (1960) [hereinafter *Enterprise Wheel*]. Seven years ago this Court reiterated its rule that courts have a limited function in reviewing arbitral awards: "courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) [hereinafter *Misco*].

Despite these clear commands, the Eighth Circuit panel reversed the opinion of the district court and vacated the arbitrator's award because: "[W]e cannot agree that [Article XI, Section I(4)] is unambiguous." App. at A-7.

Decisions about ambiguity necessarily underlie, and are part and parcel of, every interpretation of the provisions of a collective bargaining agreement by an arbitrator. If unambiguous, the arbitrator will apply the plain words of the agreement; if ambiguous, the arbitrator may "resort to [the] technical rules of interpretation." Frank Elkouri & Edna A. Elkouri, *How Arbitration Works* 342 (4th ed. 1985) [hereinafter *How Arbitration Works*].

As part of his interpretation of the collective bargaining agreement, the arbitrator's decision about ambiguity must receive the deference ordered by this Court; courts "do not sit to hear claims of factual or legal error by an arbitrator. . . . [t]he parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." *Misco*, 484 U.S. at 38.

For the repeated conflicts among the circuits that the instant decision creates, *see, e.g., International Bhd. of Electrical Workers v. Public Serv. Co. of New Mexico*, 980 F.2d 616, 619 (10th Cir. 1992) ("it is not our function to determine whether the arbitrator misinterpreted the Agreement"); *Polk Bros., Inc. v. Chicago Truck Drivers Union*, 973 F.2d 593, 597(7th Cir. 1992) ("This circuit upholds an arbitrator's award based on a misreading of the contract so long as the arbitrator's interpretation is derived from the language of the contract."); *Local 1199, Drug, Hospital and Health Care Employees Union v. Brooks Drug Co.*, 956 F.2d 22, 26 (2d Cir. 1992) ("Our task, however, is not to review the accuracy of the arbitrator's construction of the . . . clause."); *Lattimer-Stevens Co. v. United Steelworkers of America*, 913 F.2d 1166, 1168-69 (6th Cir. 1990); *Stead Motors v. Automotive Machinists Lodge 1173*, 886 F.2d 1200, 1204 (9th Cir. 1989) (en banc), *cert. denied*, 495 U.S. 946 (1990) (a reviewing court is "bound — under all except the most limited circumstances — to defer to the decision of [the arbitrator], even if . . . [the decision of the arbitrator] finds the facts and states the

law erroneously"]; *American Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 2 (D.C. Cir. 1986) ("A court has no authority to discard a labor arbitration award which is concededly based on the collective bargaining agreement and then substitute its own view of the proper interpretation of the contract.").

II. AN ARBITRATOR IS NOT COMPELLED TO LOOK TO THE PARTIES' PAST PRACTICES OR TO THE LAW OF THE SHOP IN INTERPRETING THE LANGUAGE OF A COLLECTIVE BARGAINING AGREEMENT

In its opinion in this case, the Eighth Circuit panel stated that it has "repeatedly applied the Supreme Court's teaching that labor arbitrators must consider the parties' past practices and 'the common law of the shop' in interpreting collective bargaining agreements." App. at A-6.

The Supreme Court has never taught that an arbitrator *must* consider the parties' past practices and the law of the shop in interpreting collective bargaining agreements. Rather, this Court has stated that the arbitrator "may . . . look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Enterprise Wheel*, 363 U.S. at 597. This permissive approach to an arbitrator's resort to sources outside the agreement itself has been followed by the several circuit courts of appeal. *See, e.g., Lattimer-Stevens Co. v. United Steelworkers of America*, 913 F.2d 1166, 1170 (6th Cir. 1990) ("The arbitrator may consider prior shop practice as evidenced by the parties' past conduct, but he is not bound by such practice."); *Chicago Newspaper Publishers Assoc. v. Chicago Printing Pressmen's Union*, 821 F. 2d 390, 394 (7th Cir. 1987).

Resort to sources other than the language of the contract is appropriate only if the language of the contract is ambiguous: "'The sources of contract interpretation include the language of

the contract and, to the extent it is ambiguous, bargaining history and past practice.'" *How Arbitration Works* 82 (Supp. 1991) (quoting *Downington School Dist.*, 88 Lab. Arb. (BNA) 59, 61 (1986) (Zirkel, Arb.)).

III. THE ISSUE IS IMPORTANT

Federal labor law and policy encourage arbitration. "[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) [hereinafter *Warrior & Gulf*].

Because of the importance of arbitration in industrial self-government, *see How Arbitration Works* 6-7, and its particular role in preventing industrial strife, special deference was given to decisions by the arbitrator that concern the collective bargaining agreement. *Warrior & Gulf*, 363 U.S. at 581-83. This special deference was intended to ensure the finality of arbitral awards, and thus to comport with the statutory scheme.

The decision by the Eighth Circuit panel threatens this system. If the courts are able to reconsider the merits of a decision of an arbitrator, and to "correct" perceived misinterpretations by the arbitrator, the arbitrator's award is final no more.

Erosion of the principles embodied in the 1960 *Steelworker Trilogy*, which in 1987 *Misco* was designed to stop, must not be permitted to begin again.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3709

International Woodworkers of America, U.S. AFL-CIO, and Its Local 5-15,
Plaintiffs - Appellees,

v.

Weyerhaeuser Company,
Defendant - Appellant.

Appeal from the United States District Court
for the Western District of Arkansas.

Submitted: June 18, 1993

Filed: October 12, 1993

Before WOLLMAN and LOKEN, Circuit Judges, and HUNTER,* Senior District Judge.

LOKEN, Circuit Judge.

Weyerhaeuser Company ("Weyerhaeuser") appeals a district court order enforcing an arbitration award issued in favor of the International Woodworkers of America and its Local 5-15 (collectively, the "Union"). We vacate the award because it did not draw its essence from the collective bargaining agreement.

I.

The arbitration at issue arose under the single collective bargaining agreement between Weyerhaeuser and Local 5-15

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*The HONORABLE ELMO B. HUNTER, Senior United States District Judge for the Western District of Missouri, sitting by designation.

covering various Weyerhaeuser facilities in Arkansas and Oklahoma (the "Agreement"). For over twenty years, Weyerhaeuser paid certain maintenance workers covered by this Agreement for their one half-hour lunch breaks because they were expected to work during lunch as the need arose. Since these employees otherwise worked an eight hour schedule, this policy assured them one half-hour of overtime pay on most work days.

On March 28, 1989, Weyerhaeuser instituted a new policy — or work schedule change, as the Company called it — giving these maintenance employees unpaid half-hour lunch breaks during which they could leave the company premises and were not expected to work. Various employees filed grievances, contending that this unilateral change in past practice was a breach of the collective bargaining agreement. Weyerhaeuser denied the grievances, and the parties proceeded to arbitration under Article VII of the Agreement providing that, "The Arbitrator shall have no power to add to or subtract from or modify any of the terms of this Agreement."

Before the arbitrator, the Union submitted evidence that the practice of paid lunch breaks had continued over the course of numerous prior agreements. Relying upon the favorable decision of another arbitrator on a similar issue, the Union argued that the practice had become an economic benefit under the Agreement and therefore Weyerhaeuser's unilateral termination of that benefit violated its duty under Article I of the Agreement "to negotiate with the changes in employee benefits that it wishes to make." Weyerhaeuser responded that its action was consistent with its prerogatives under the "Management's Rights" provisions in the Agreement and that the prior award was clearly wrong and, in any event, was not binding in this arbitration.

The arbitrator decided in favor of the Union, awarding affected employees back pay for their unpaid lunch periods from March 28, 1989, without interest. Ignoring the arguments made by the parties, the arbitrator based his decision upon Article XI,

Section I, of the Agreement, which provides:

> Time and one-half shall be paid for the following:
>
> 1) For all time worked in excess of forty (40) hours in any one week.
>
> 2) For all hours worked on the holidays specified in this Agreement in addition to holiday pay if so entitled.
>
> 3) For all time worked during the twenty-four (24) hour period on Sunday.
>
> 4) For all time in excess of eight (8) hours in any one day.

The arbitrator reasoned that the presence of the word "worked" in the first three clauses of Section I and its absence from clause 4 was dispositive. Invoking the principle that all words in a contract must have meaning, the arbitrator concluded:

> [I]n this one overtime provision alone [clause 4], the hours in excess of 8 in one day are not hours that are required to be worked. Rather, any time in excess of 8 hours in one day, that the employee is required to be at the Employer's place of business, qualifies the employee for overtime pay.

Therefore, "Section I of Article XI expressly provides for overtime pay for those employees who have 'time' at the plant, at the request of the Company, in excess of 8 hours in any one day," and Weyerhaeuser must continue to pay overtime for the scheduled lunch breaks regardless of whether work is required.

Weyerhaeuser petitioned to reopen the proceedings. Noting that neither party had suggested that Article XI, Section I(4), provided a basis for resolving the dispute, Weyerhaeuser stated that it could offer "irrefutable proof" that omission of the word "worked" from that provision was a clerical error in the original 1973 collective bargaining agreement and that both parties had consistently interpreted the provision as referring only to time

worked. The arbitrator refused to reopen, stating that his issuance of the award rendered him *functus officio*.[1]

The Union commenced this action seeking enforcement of the award, and Weyerhaeuser urged the district court to vacate. The district court granted summary judgment in favor of the Union, concluding that, "An arbitrator's decision, drawn from the unambiguous, and internally consistent language of a contract must receive great respect by a trial court." On appeal, Weyerhaeuser argues that the arbitrator went beyond his contractual authority, and failed to draw his award from the Agreement, when he relied upon an ambiguous provision not addressed by the parties.

II.

We agree with the district court that the scope of judicial review of arbitration awards under collective bargaining agreements is extremely limited:

> The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on error of fact or on misinterpretation of the contract. . . . As long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice," the award is legitimate.

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987), quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Thus, we must

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[1] Under the doctrine of *functus officio*, "once an arbitrator has made and published a final award his authority is exhausted, and he . . . can do nothing more in regard to the subject matter of the arbitration." *La Valle Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967). *See Domino Group, Inc. v. Charlie Parker Memorial Found.*, 985 F.2d 417, 420-21 (8th Cir. 1993).

determine whether the arbitrator's award in this case "draws its essence from the collective bargaining agreement."

The "essence" of a collective bargaining agreement cannot always be divined by the same process that a court uses in construing a more typical commercial contract. As the Supreme Court explained in its landmark *Steelworkers Trilogy*, "The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plant." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960). Therefore, "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it." *Id.* at 581-82.

In this case, the arbitrator based his award on Article XI, Section I(4), of the Agreement. In interpreting this provision, the arbitrator employed a purely textual analysis, relying on the absence of the word "worked" in Section I(4), its presence in Sections I(1)-(3), and the principle that each word in a contract must be given meaning. Had the parties submitted evidence and conflicting argument as to the proper construction of this provision, we would be required to enforce this interpretation. In labor arbitration, "It is the arbitrator's construction which was bargained for." *Enterprise Wheel*, 363 U.S. at 599. Therefore, "an [arbitrator's] interpretation of the literal language of the disputed provision . . . obviously draws its essence from the collective bargaining agreement." *United Food & Commercial Workers, Local No. 222 v. Iowa Beef Processors, Inc.*, 683 F.2d 283, 285 (8th Cir.), *cert. denied*, 459 U.S. 1088 (1982).

But in this case the parties did not address Article XI, Section I(4), in the evidence and argument they submitted to the arbitrator. By their silence, the parties represented to the arbitrator that

this provision did not afford a basis for resolving this dispute. More significantly, the absence of evidence on the question deprived the arbitrator of the "industrial common law" surrounding this part of the Agreement — its negotiating history, relevant past practices of the industry and shop, and other extrinsic indicia of the parties' intent.

Weyerhaeuser argues that the arbitrator exceeded his authority by basing his award on a provision of the Agreement not addressed by the parties. But we held to the contrary in *Lackawanna Leather Co. v. United Food & Commercial Workers Int'l Union*, 706 F.2d 228, 230-32 (8th Cir. 1983) (en banc), where we upheld an award that was based upon the arbitrator's "normal interpretation" of a provision "common in collective bargaining agreements." *Lackawanna* thus establishes that the arbitrator acted within his authority in considering the entire Agreement before deciding the grievance submitted to him. The question remains, however, whether his award drew its essence from that Agreement.

We have repeatedly applied the Supreme Court's teaching that labor arbitrators must consider the parties' past practices and "the common law of the shop" in interpreting collective bargaining agreements. In *Trailways Lines, Inc. v. Trailways. Inc. Joint Council*, 807 F.2d 1416, 1423 (8th Cir. 1986), we affirmed the vacating of an award because the arbitrator had ignored the "law of the shop," had failed to discuss a relevant contract provision, and had simply copied from his decision in a previous case. In *International Union UAW v. White Motor Corp.*, 505 F.2d 1193, 1198-99 (8th Cir. 1974), *cert. denied*, 421 U.S. 921 (1975), we enforced an award because the arbitrator had properly considered the parties' bargaining history and prior agreements in concluding that the absence of an attachment to the collective bargaining agreement was an inadvertent omission. *See also Fairview Southdale Hosp. v. Minnesota Nurses Ass'n*, 943 F.2d 809 (8th Cir. 1991) (arbitrator properly relied upon past conduct in construing ambiguous provision).

If Article XI, Section I(4), was an "unambiguous, and internally consistent" provision, as the district court concluded, we would not fault the arbitrator for applying its plain meaning to the grievance before him. But we cannot agree that this provision is unambiguous. Standing alone, Article XI, Section I(4), reads, "Time and one-half shall be paid for . . . all time in excess of eight (8) hours in any one day." There is some ambiguity in that language, but its "normal interpretation" (to borrow the key phrase in *Lackawanna*) would surely be that it is limited to "time worked"; in other words, the word "worked" would be read into the provision, *the opposite of the arbitrator's construction in this case*. When Section I(4) is compared to Sections I(1)-(3), which contain the word "worked," the significance of the omission of that word in Section I(4) becomes far more problematic. As the arbitrator implicitly recognized by invoking the all-words-must-have-meaning canon of construction, Section I(4) becomes materially ambiguous.

Under the *Steelworkers Trilogy*, such ambiguity may only be properly resolved by considering the parties' bargaining history and past practices — the "industrial common law [that] is equally a part of the bargaining agreement although not expressed in it." *Warrior & Gulf*, 363 U.S. at 581-82. Thus, when the arbitrator construed this ambiguous provision without seeking the parties' guidance as to its intent and without evidence of their relevant past practices, he acted without considering the entire agreement. In these circumstances, we do not simply disagree with his interpretation of the Agreement; we conclude that he dispensed "his own brand of industrial justice," and his award cannot be said to "draw its essence from the collective bargaining agreement."

Accordingly, without deciding the merits of the underlying grievance, we vacate the arbitrator's award. The judgment of the district court is reversed and the case is remanded with instructions to remand to the arbitrator for such further proceedings as

the collective bargaining agreement may permit. *See Misco*, 484 U.S. at 40 n.10.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

Civil No. 91-6127

INTERNATIONAL WOODWORKERS OF AMERICA, U.S., AFL-CIO, and its LOCAL NO. 5-15,
Plaintiffs,

vs.

WEYERHAEUSER COMPANY,
Defendant.

MEMORANDUM AND ORDER

Both parties to this action have moved for summary judgment pursuant to Rule 56. F.R.C.P.

The matter before this court arises out of a decision by Arbitrator Barnett M. Goldstein, which awarded to the plaintiffs, members of the International Woodworkers of America, payment for scheduled 30 minute lunch breaks, at the hourly wage rate. The award was based upon the arbitrator's application of the "plain language" of the collective bargaining agreement effective March 1, 1988 through March 1, 1991.

The plaintiffs sued in the United States District Court for the Western District of Arkansas to enforce the arbitration award.

The court is faced with the problem of determining whether a claimed error in printing a contract can be resolved by an arbitrator. The role of the court is very limited when reviewing an arbitrator's decision.

> It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed

> by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 37 (1987) (quoting *Steelworkers v American Mfg. Co.*, 363 U.S. 564, 567-68 (1960)).

The Supreme Court went on to explain that

> an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having *authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.*

United Paperworkers International Union, 484 U.S. at 38 (emphasis added).

Statements of uncontroverted facts were filed by the parties pursuant to local rule No. 29 (Docket items 16 & 22). The statements of material uncontroverted facts are of little value in resolution of the motions for summary judgment except that they demonstrate that the parties are in complete disagreement as to what facts are material. But this much can be gleaned from the Rule 29 filings and the arguments of counsel:

1) The collective bargaining agreement in effect at the time the dispute arose covers the period from March 1, 1988 through March 1, 1991.

2) It contains the following provision.

Section I of Article XI:

Time and one-half shall be paid for the following:

1) For all time worked in excess of forty (40) hours in any one (1) week.

2) For all hours worked on the holidays specified in this Agreement, in addition to holiday pay if so entitled.

3) For all time worked during the twenty-four (24) hour period on Sunday.

4) For all time in excess of eight (8) hours in any one day.

Labor Agreement at 29-30.

3) For some time prior to March 28, 1989, certain of the Maintenance employees who work at the various plants in Wright City, had observed a practice of eating their lunch while they were working, or when they could, depending upon their work load, and were paid for the time period as observed by these employees as a "lunch period." Over a more than 20-year period, this practice seems to have been changed by the Company at various times, and was not a practice that was made available to all the Maintenance employees at all times.

On March 28, 1989, the Company sent a Memorandum to all Maintenance employees at Wright City, and to their Supervisors, notifying them that all maintenance employees thereafter, "will have a scheduled non-paid lunch break. The supervisors in these areas will schedule each individual's lunch period. This is a scheduled lunch period and employees may eat lunch on or off the premises."

(Goldstein Award at 2).

4) The company relies on Article II Management Rights Section II. "The Company specifically reserves the right to, in

accordance with its judgment . . . make or change rules, policies and practices *not in conflict with the provisions of this agreement.*" (Labor Agreement at Art. II Sect. II).

5) The company also asserts that Article XI Section I, (4) contains an error in that Section I-(4) should have read: "for all time *worked* in excess of 8 hours in any one day." and that an error is self evident when (4) is compared to (3), (2), and (1) which precedes it in Article XI.

But this language has continued for many previous contracts, and while it differs with items 3, 2, and 1, it is consistent with the elemental concept that an 8 hour day of controlled time is not the same as 8 1/2 hours of controlled time. (A 30 minute lunch break, which allows an employee to leave the premises, will hardly let him go far.)

The arbitrator carefully emphasized that management's prerogative to make and change policies and practices does not include a prerogative to violate the clear, unambiguous language of the agreement. Finally the arbitrator pointed out that he was bound to apply all the words in the labor agreement, and accordingly found that:

> It is obvious to this arbitrator that the change made by the Company on March 28, 1989, was in direct contravention of, and conflict with, the express provisions of the Agreement. The employees who worked, and/or who were at the Employer's place of business, and ready, willing and able to work, were not being paid in accordance with the overtime provisions of the Agreement (over 8 hours in a day).
>
> The Company contends that there is nothing in the Labor Agreement, either express or implied, "concerning a paid lunch period." I cannot agree. Section I of Article XI expressly provides for overtime pay for those employees

> who have "time" at the plant, at the request of the Company, in excess of 8 hours in any one day. Those employees are not being paid in accordance with the express terms of the Agreement.

(Goldstein Award at 8).

Decision:

An arbitrator's decision, drawn from the unambiguous, and internally consistent language of a contract must receive great respect by a trial court. As stated in *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1959), ". . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the Courts have no business overruling him because their interpretation of the contract is different from his."

Motion for summary judgment in favor of the defendant, Weyerhaeuser Company, is denied.

Motion for summary judgment in favor of the plaintiffs, International Woodworkers of America, U.S., AFL-CIO, and its Local No. 5-15, is granted.

Let judgment be entered accordingly.

Dated this 28 day of September, 1992.

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

Civil No. 91-6127

INTERNATIONAL WOODWORKERS OF AMERICA, U.S., AFL-CIO, and its LOCAL NO. 5-15,
Plaintiffs,

vs.

WEYERHAEUSER COMPANY,
Defendant.

ORDER

After reviewing the Defendant's Motion to set aside the Amended Judgment and reconsider Defendant's Motion for Summary Judgment and supporting brief, briefs of both parties for Cross-Motions for Summary Judgment and the record, the court is convinced that no error was committed. We note that no response has been filed under Rule 29(b) of the Arkansas Local Rules of Court. Therefore, we conclude that Plaintiff opposes neither the Motion to Reconsider the Amended Judgment nor the Motion to Reconsider the Summary Judgment.

THEREFORE,

IT IS ORDERED:

That Defendant's Motion to reconsider its Amended Judgment and reconsider Defendant's Motion for Summary Judgment is granted; and

That after having reconsidered Defendant's Motion, the court finds no error; therefore Defendant's Motion for Summary Judgment is denied and the Amended Judgment stands.

Dated this 28 day of October, 1992.

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

Civil No. 91-6127

INTERNATIONAL WOODWORKERS OF AMERICA, U.S., AFL-CIO, and its LOCAL NO. 5-15,
Plaintiffs,

vs.

WEYERHAEUSER COMPANY,
Defendant.

REPORT AND RECOMMENDATION

The plaintiffs, International Woodworkers of America, U. S., et al (IWA) filed their Complaint herein on October 25, 1991, seeking enforcement of two arbitration awards and related relief. The defendant, Weyerhaeuser Company, filed its Counterclaim on December 9, 1991 asking the court to vacate and reverse the arbitration award and for related relief. Cross Motions for Summary Judgment are before the court. The parties have agreed that they should engage in further review of the award issued by Arbitrator Giles and this Court need not address the parties' Motions for Summary Judgment with respect to that award.

The award issued by Arbitrator Goodstein involved defendant Weyerhaeuser's decision to change the work schedule of certain of its employees and to cease to pay for time used for lunch periods. The arbitrator found for IWA and directed Weyerhaeuser to pay the affected employees their back pay for all time in excess of 8 hours in any day that each was scheduled to work.

Plaintiffs' Motion is based on the theory that the arbitration award is final, binding and nonreviewable by this Court except

in limited circumstances and, therefore, there is nothing for this Court to decide. The role of the courts in reviewing arbitration awards is extremely limited as is amply illustrated by plaintiff IWA's brief in support of its Motion. *See International Brotherhood of Electrical Workers Local 53 vs. Sho-me Power Corp.*, 715 F.2d 1322 (8th Cir. 1983). *See also W.R. Grace and Company vs. Local Union 759. International Union of the Rubber Workers of America*, 461 U.S. 757 (1983). *But see United Steel Workers of America v. Wheel and Car Company.* 363 U.S. 593, 597 (1960).

Weyerhaeuser's Counterclaim is based on the alleged facts that the word "worked" was intended to be included in Article XI, Section I (4) of the parties collective bargaining agreement but was omitted by a ministerial error.

A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). On a motion for summary judgment, this court must determine if a fair minded jury could return a verdict for the nonmoving party. *Id.* at 252. The party seeking summary judgment must show that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law by "pointing out" to the court that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[paragraph deleted because it merely repeated immediately preceding paragraph]

The party opposing summary judgment must designate specific facts establishing a genuine issue for trial. *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 587. However, all inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Id.*

The court must uphold the arbitrator's award so long as it draws its essence from the collective bargaining agreement. *International Brotherhood of Electrical Workers, Local Union No. 53, AFL-CIO, supra.* The arbitrator may not disregard unambiguous contract provisions. *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988). The arbitrator may not ignore the plain language of the contract. *United Paperworkers International Union v. Misco Inc.*, 484 U.S. 29, 38 (1987). It is not our purpose here to address whether the contract provisions are ambiguous or the meaning of the plain language of the parties' contract. Rather, we must decide if there are material facts in dispute. The exact wording of a critical part of the contract is a material factual issue.

The parties intention and the nature of the alleged omission of the word "worked" are material facts in dispute. Furthermore, the parties' Motions and supporting documents indicate disagreement over whether omission of the word "worked" has been recognized and acknowledged as an a ministerial error by the parties' performance of the contract since 1973. The Court will ultimately have to determine whether the limited circumstances under which it can review the arbitration award exist in this case. Since there are material facts in dispute which must be determined before the court can reach that point, the parties' Motions for Summary Judgment should be denied.

The parties may file specific written objections to these findings and recommendations and must provide the factual or legal basis for each objection. An original and one copy of the objections must be filed with the Clerk of Court, P. O. Box I, Hot Springs, AR 71902 within 10 days. A copy must be served on the opposing parties.

The District Judge, even in the absence of objections, may reject these findings and recommendations in whole or in part.

Dated this 28th day of August, 1992.

/s/ Charles G. Vaccaro
CHARLES G. VACCARO
U. S. Magistrate Judge

APPENDIX E

IN THE MATTER OF ARBITRATION BETWEEN

WEYERHAEUSER COMPANY
(MID-SOUTH WOOD PRODUCTS)

AND

INTERNATIONAL WOODWORKERS OF AMERICA,
AFL-CIO, LOCAL 5-15

FMCS #91-03643

GRIEVANCES: #89-WCPM-38
#89-WCMT-29, 30, 31 & 34

GRIEVANTS: MAINTENANCE EMPLOYEES (PINE MERCHER, HARDWOOD MERCHER, HARDWOOD SAWMILL, PINE LUMBER & PLYWOOD)

HEARING HELD ON MAY 16, 1991, AT THE PALACE RESTAURANT, DE QUEEN, ARKANSAS, WITH NEAL SULLINS, SENIOR ATTORNEY FOR THE COMPANY, REPRESENTING THE COMPANY; RANDALL RICE, VICE-PRESIDENT OF THE INTERNATIONAL UNION, REPRESENTING THE LOCAL UNION; THE LOCAL UNION REPRESENTING ALL THE GRIEVANTS COVERED BY THE GRIEVANCES COMBINED FOR THIS HEARING, BEFORE BARNETT M. GOODSTEIN, IMPARTIAL ARBITRATOR, SELECTED THROUGH THE PROCEDURES OF THE FMCS, WASHINGTON, D.C.

BACKGROUND

The Company operates a large manufacturing complex at Wright City, Oklahoma, and has other facilities at locations in Arkansas. All of these operations are combined for purposes of collective bargaining, and there is one Agreement between the Company and Local 5-15 of the IWA covering all the locations

at Arkansas and Oklahoma. These Grievances, all combined and heard as one Grievance herein, cover Maintenance Employees who work at the Pine Mercher, Hardwood Mercher, Hardwood Sawmill, Pine Lumber & Plywood Plants within the Company's manufacturing complex.

The various plants at Wright City, Oklahoma process logs for manufacture; and the conversion of logs into pine lumber, hardwood lumber, and pine plywood. Certain of the Maintenance Employees work in one department only; however, those in the "Maintenance and Electrical" Department, and those in the "Filing and Grinding" Department provide maintenance services throughout the entire complex, servicing all departments.

For some time prior to March 28, 1989, certain of the Maintenance employees who work at the various plants in Wright City, had observed a practice of eating their lunch while they were working, or when they could, depending upon their work load, and were paid for the time period as observed by these employees as a "lunch period." Over a more than 20-year period, this practice seems to have been changed by the Company at various times, and was not a practice that was made available to all the Maintenance employees at all times.

On March 28, 1989, the Company sent a Memorandum to all Maintenance employees at Wright City, and to their Supervisors, notifying them that all maintenance employees thereafter, "will have a scheduled non-paid lunch break. The supervisors in these areas will schedule each individual's lunch period. This is a scheduled lunch period and employees may eat lunch on or off the premises."

As a result of this Memorandum to the maintenance employees, various groups of such employees filed Grievances over this unilateral change in their previous paid lunch period, on March 28, March 30, April 6 and April 19, 1989, all requesting that the Company not reschedule their lunch periods for the sole purpose

of avoiding the payment of overtime pay to these employees, in violation of the Collective Bargaining Agreement, and that they be paid back pay for all the unpaid lunch periods since the March 28 Memorandum. The Company responded in each case that, "Scheduled non-work lunch periods is not a violation of the labor agreement," and denied all the Grievances. They were processed through the Grievance Procedure to arbitration.

ISSUE

DID THE COMPANY VIOLATE THE COLLECTIVE BARGAINING AGREEMENT ON AND AFTER MARCH 28, 1989, WHEN IT CEASED PAYING LUNCH PERIODS FOR THOSE MAINTENANCE EMPLOYEES WHO HAD BEEN RECEIVING SUCH PAYMENTS PRIOR TO THAT DATE? IF SO, WHAT SHALL BE THE APPROPRIATE REMEDY THEREFORE?

OPINION OF THE ARBITRATOR

The Union contends that the Company had established a past practice of paying its Maintenance and Electrical employees at its Wright City, Oklahoma plants, a 30-minute lunch break. When the Company stopped this practice, unilaterally, and without negotiation with the Union, it violated the Collective Bargaining Agreement. The Union's arguments are based on the fact that Article I of the Agreement (Recognition) places upon the Company "the obligation to negotiate with the Union any changes in employer benefits that it wishes to make."

The Union contends that paid lunch breaks are a benefit to the employees, and once having been given to the employees, cannot be then unilaterally taken away from those employees. The Union argues that, since the practice continued, with only short interruptions for certain maintenance employees, for over 20 years, and many Labor Agreements were negotiated during that period, with no change having been negotiated in any of

those Agreements concerning the paid lunch periods, that economic benefit now has become a part of the Labor Agreement. Therefore, it can be changed only by negotiation between the Company and the Union, and cannot be unilaterally changed by the Company, as it did on March 28, 1989.

The Company responds to this Union argument by contending that the Company has the contractual authority to change custom and past practice. The Company argues that the Contract is "clear and unambiguous," and that it specifically gives to the Company the right to change current practices and not to be bound by past practices. The Company contends that, since there is no "maintenance of standards" clause in the Labor Agreement, and since the Management Rights Clause gives the Company the express right to change past practices, it is not bound by the past practice of paid lunch periods.

The Company cites Section II of Article II (Management's Rights) to prove its point. This Section, as quoted by the Company, reads as follows: "The Company specifically reserves the right to, in accordance with its judgment . . . make or change rules, policies and practices *not in conflict with the provisions of this agreement.*" (emphasis added by the arbitrator)

Thus, both parties appear to agree that there was a past practice by the Company of paying certain Maintenance employees for a lunch period during their respective shifts. Moreover, the Company defends its right to have paid lunch periods for many years, and then unilaterally change that practice, by the provisions of Section III of Article II of the Agreement. That Section provides, in pertinent part, that the Company does not waive its right to exercise any function reserved to it by not exercising that function for any particular period of time, "or preclude the Company from exercising the same in some other way not in conflict with the express provision of this Agreement."

Thus, the Management Rights Article gives the Company certain definite rights to exercise, so long as the exercise of those rights is "not in conflict with the provisions of this agreement." Moreover, the Company is not restricted in this exercise, even though not exercised for long periods of time, so long as its exercise is "not in conflict with the express provision of this Agreement." In addition, the Company argues that "there is absolutely no language, express or implied, contained in the Labor Agreement concerning a paid lunch period."

There are, however, express provisions contained in the Labor Agreement that cover payment for certain hours in excess of 8 in a day, or 40 in a week, or on Saturdays, Sundays, or Holidays (Article XI — Overtime and Premium Pay). The provisions of Article XI may be more important to this discussion, and the Grievances covered by this hearing, than the contentions of both parties concerning past practice, and its effect on the benefits of the employees, or the rights of Management under the Agreement.

The Company is correct in pointing out to this arbitrator that the provisions of Article VII (Grievance Procedures) of the Labor Agreement provide, in Section II, that "The Arbitrator shall have no power to add to or subtract from or modify any of the terms of this Agreement. . . ." This arbitrator is well aware of that mandate and prohibition, and believes in a strict construction of the Agreement itself, and all its provisions.

Whether or not the arbitral opinions of various arbitrators, concerning the force and effect of Past Practice, and whether or not such practices can, or do, become a part of the Labor Agreement under certain circumstances, cannot even be reached in this case, if the express provisions of the Agreement provide the resolution of this Grievance without discussions of the Past Practice issue.

Article XI of the Agreement governing this Grievance, and the interpretation of this Agreement to resolve the difference between the parties, may well cover the very issue, or issues, involved in all the Grievances that here have been combined to be heard as one Grievance herein.

Section I of Article XI provides that "Time and one-half *shall* be paid for the following (emphasis added):

"1) For all *time worked* in excess of forty (40) hours in any one week.

"2) For all *hours worked* on the holidays specified in this Agreement in addition to holiday pay if so entitled. (emphasis added)

"3) For all *time worked* during the twenty-four (24) hour period on Sunday. (emphasis added)

"4) For all *time* in excess of eight (8) hours in any one day. (emphasis added)

It is an axiom of industrial relations that all the words in a Labor Agreement have a meaning; they were placed there, or used, for some particular purpose.

In the provision for overtime in excess of 40 hours in one week, the requirement is for all "time worked." In the provision for overtime for holidays, the requirement is for all "hours worked" on such holidays. For overtime on Sundays, there is a requirement of all "time worked" during the 24-hour period on Sunday. However, for overtime in excess of 8 hours in any one day, the only requirement is for "all *time* in excess of" 8 hours in a day. (emphasis added)

In each of the first three provisions, the words, "time worked," or "hours worked," is a requirement for overtime pay. Only in the case of overtime worked in excess of 8 hours in one day is the provision for "time," and the word, "worked" is not included in

that provision. Therefore, in this one overtime provision alone, the hours in excess of 8 in one day are not hours that are required to be worked. Rather, any time in excess of 8 hours in one day, that the employee is required to be at the Employer's place of business, qualifies the employee for overtime pay. However, the Agreement specifically provides that hours shall not be pyramided for the purposes of payment of overtime pay. Nevertheless, the preamble to Section I of Article XI specifically provides that overtime "shall" be paid for "all time in excess of eight (8) hours in any one day."

The parties introduced into evidence Joint Exhibit 4 that appears to be a Memorandum from Management to the President of the IWA Local at Wright City. That Memorandum indicates that, before the scheduled change for a lunch break, the "typical maintenance employee" would work from 7:00 a.m. to 3:30 p.m. from Monday through Friday, and from 6:00 a.m. to 3:30 p.m. on Saturday. That is a period of 8-1/2 hours during the week days, and 9-1/2 hours on Saturday (with one week day off if the employee was to work on Saturday). The Memo indicates, further, that the employee would work and/or be paid for 8-1/2 hours for days assigned from Monday through Friday, and for 9-1/2 hours on Saturday.

The same Memorandum then shows how the pay schedule would be handled after the unpaid lunch period was scheduled. The hours on each shift continue to be the same; i.e., 8-1/2 hours per shift on Monday through Friday, and 9-1/2 hours on Saturday. However, the hours now being paid would be 8 per day on Monday through Friday and 9 on Saturday. This difference is due to the unpaid lunch period of 30 minutes daily.

The parties introduced Joint Exhibit 5 that covers the work schedules of "maintenance personnel assigned to plywood." (Joint Exhibit 4 covered all other maintenance personnel, plywood schedules being different). This schedule indicates that,

prior to March 28, 1989, maintenance employees in the plywood plant worked from 6:00 a.m. to 2:00 p.m. on Monday through Friday (with one scheduled day off), and worked from 6:00 a.m. to 3:30 p.m. on Saturday. These employees worked an 8-hour shift during the week-days, and a 9-1/2 hour shift on Saturday. The Exhibit indicates that they were paid for 8 hours for Monday through Friday, and for 9 hours on Saturday (however, they show to have worked for 9-1/2 hours on Saturday).

After the March 28, 1989 change in their work schedule, for the unpaid lunch period, the hours changed on Monday through Friday to: 6:00 a.m. to 2:30 p.m. (unchanged on Saturday). However, payment for these hours now was unchanged at 8 hours per day for week days, and at 9 hours for Saturdays worked. However, now the plywood maintenance employees were at the plant an extra one-half hour (8-1/2 hours) per day during the week, and the same 9-1/2 hours on Saturday.

According to Article XI of the Agreement, all "time in excess of eight (8) hours in any one day," should have been paid by the Company at the rate of 1-1/2 times the regular hourly rate of the individual employee. It appears from these two Joint Exhibits that such was not the case, and the "typical" maintenance employee worked the same number of hours as before: i.e., 8-1/2 hours (including lunch break), but after March 28, 1989, was paid only for 8 hours, in violation of Article XI of the Agreement. The maintenance employees in the plywood plant were required to work an additional 30 minutes during the week, for which they were paid nothing, and continued to work 9-1/2 hours on Saturday, but were paid only for 9 hours, again in violation of Article XI of the Agreement.

It is obvious to this arbitrator that the change made by the Company on March 28, 1989, was in direct contravention of, and conflict with, the express provisions of the Agreement. The employees who worked, and/or who were at the Employer's

place of business, and ready, willing and able to work, were not being paid in accordance with the overtime provisions of the Agreement (over 8 hours in a day).

The Company contends that there is nothing in the Labor Agreement, either express or implied, "concerning a paid lunch period." I cannot agree. Section I of Article XI expressly provides for overtime pay for those employees who have "time" at the plant, at the request of the Company, in excess of 8 hours in any one day. Those employees are not being paid in accordance with the express terms of the Agreement.

The Union alleged that the Company was in violation of the Labor Agreement for not so paying its employees overtime pay. The Grievances allege that the Company violated Article XI (overtime pay) "and all applicable" provisions of the Agreement. Ample proof was introduced in evidence to prove that the Company is not paying its Maintenance employees in accordance with Article XI of the Agreement.

The Company contends that this arbitrator is not bound by the prior award of Dr. A. Dale Allen. I agree. If the prior award of another arbitrator is "clearly erroneous," a subsequent arbitrator is not bound by the award of the previous arbitrator. I agree, also, that arbitration awards do not have the same doctrinal force — insofar as the doctrines of stare decisis and res judicata are concerned — as have the judicial decisions in appellate judicial forums.

In proof of this argument, the Company quotes from a maxim set forth by former Supreme Court Justice William O. Douglas, stated as follows: "An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." I agree completely with this maxim. However, my opinion and award do not follow that of Professor Allen in the case submitted as Joint Exhibit 6, as his award seems to be based almost, if not,

entirely on the argument of Past Practice, and it becoming an integral part of the Labor Agreement, under certain circumstances. My own opinion and award are not concerned with the issue of Past Practice. Rather, they draw their essence directly from a specific provision of the Agreement itself; one that has been negotiated and agreed upon by both parties to the said Agreement, and one that is binding upon both such parties.

The Company relies heavily on Section III of Article II (Management's Rights Clause) of the Labor Agreement. The Company cites that part of the Agreement that provides that the Company is not precluded from exercising any function reserved to it in the Agreement "in some other way not in conflict with the express provisions of this agreement." However, as I have shown above, the Company did exercise this function (of scheduling an unpaid lunch period during the Maintenance employee's regularly-scheduled shift.) If the Company keeps the employee at the plant for more than 8 hours in any one day period, then it must pay that employee for all hours over 8 at the overtime rate. It has not done so.

The Company then cites from the Elkouri book, HOW ARBITRATION WORKS, as follows:

> "Ordinarily all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning, and it will not be declared surplusage if a reasonable meaning can be given to its consistent with the rest of the agreement."

This arbitrator follows this reasoning by the Elkouris, and has given each word in Section II of Article XI the meaning that appears to be that intended by the parties. If a certain word is used by the parties in their Agreement, then, certainly, the omission of a certain word — in the context of the other words so used — must have some meaning as well. Since the parties chose to use the words, "time worked," or "hours worked," in three of the four

provisions of Section II of Article XI, then there must have been some valid, logical reason that the parties chose to drop the word "worked" from the fourth such provision. In any event, they negotiated the wording of that said Section, and that cannot be ignored.

Since the thrust of the Company's Brief, filed in this matter, seems to be that of discounting the Allen Award; of showing that it was not a correct award; that it did not draw its essence from the Agreement; and that it was made without benefit of some important and relevant facts and considerations, I will spend no more time in an effort to distinguish this opinion and award from that of Dr. Allen. Suffice it to say, we have approached the issue of scheduled unpaid lunch periods from an entirely different point of view. Therefore, I am not concerned with the validity of Dr. Allen's finding of fact, his conclusions, or of his award. My own award must stand on its own merits, based upon my reasoning as expressed herein.

The Grievances request the payment of all hours after March 28, 1989, for which the Company refused to pay due to the scheduling of unpaid lunch periods to the covered Grievants. I have found these Grievants are entitled to such back pay award. However, the Grievants also request this arbitrator to grant them interest on their back pay award. Interest on back pay awards usually is granted, if and when it is so granted, as a form of punishment. Such punishment is meted out in the event the arbitrator finds the Company, in this instance, to have acted arbitrarily, capriciously or maliciously. This arbitrator cannot find that the Company here has been guilty of any of those transgressions. Rather, I find that the Company is honest and earnest in its belief that its interpretation of the Agreement is the correct interpretation. The Company sincerely believes that Dr. Allen's award was incorrect and wrong. However, just because the Company failed to note the difference in the overtime provisions of Section I of Article XI does not prove that the

Company acted in complete disregard of the rights and privileges of the Grievants, or in disregard of its obligations under the Agreement. The Company merely has a different interpretation of the Labor Agreement than does this arbitrator, as applies to the issue in question. No interest will be awarded.

AWARD OF THE ARBITRATOR

The Issue: DID THE COMPANY VIOLATE THE COLLECTIVE BARGAINING AGREEMENT ON AND AFTER MARCH 28, 1989, WHEN IT CEASED PAYING LUNCH PERIODS FOR THOSE MAINTENANCE EMPLOYEES WHO HAD BEEN RECEIVING SUCH PAYMENTS PRIOR TO THAT DATE? IF SO, WHAT SHALL BE THE APPROPRIATE REMEDY THEREFOR? is answered in the affirmative. The Company did so violate section I of Article XI of the Agreement. The Grievance, therefore, is sustained and the Company is directed to pay the affected employees their back pay for all time in excess of 8 hours in any day, Monday through Saturday, that each Grievant herein was scheduled to work on and after March 28, 1989, but no interest shall be due or payable thereon.

/s/ Barnett Goodstein
Barnett M. Goodstein
Arbitrator

4230 LBJ Freeway, Suite 121
Dallas, Texas 75244
(214) 387-4303

July 24, 1991

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3709WAHS

International Woodworkers of America,
U.S., AFL-CIO;
Local 5-15 International Woodworkers of America,
U.S., AFL-CIO,
Plaintiffs-Appellees,

vs.

Weyerhaeuser Company,
Defendant-Appellant.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Chief Justice Arnold, Judge McMillian, and Judge Morris Sheppard Arnold would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

Judge John R. Gibson took no part in the consideration or decision of this case.

January 11, 1994

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
MAY 9 1994
OFFICE OF THE CLERK

No. 93-1586

In The

Supreme Court of the United States

October Term, 1993

INTERNATIONAL WOODWORKERS OF AMERICA, U.S. AFL-CIO, AND ITS LOCAL NO. 5-15,

Petitioner,

versus

WEYERHAEUSER COMPANY,

Respondent.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeal properly set aside an arbitrator's award when the arbitrator based his decision on a materially ambiguous provision of the collective bargaining agreement that the parties had not submitted for review and about which the parties had not presented any evidence of past practice or bargaining history.

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STATEMENT OF THE CASE

Weyerhaeuser filed its appeal with the Eighth Circuit Court of Appeals requesting that the award of Arbitrator Barnett M. Goodstein ("Goodstein") be vacated, and the decision of the district court be reversed, because Goodstein based his award on an ambiguous provision of the Collective Bargaining Agreement that neither party had ever considered germane to the issue presented and about which no evidence of past practice or bargaining history had been offered. Although Goodstein may have believed that he had come up with a solution that both the union and Weyerhaeuser had overlooked, his reading of the provision was in *direct conflict* with the manner in which it had been administered for over eighteen years – i.e., Goodstein's failure to seek guidance from the parties resulted in an award that was not drawn from the essence of the agreement.

The issue presented for Goodstein's review was whether Weyerhaeuser had the contractual right to change the schedule for time actually worked from eight and one-half hours a day to eight hours a day, with a thirty minute non-work lunch period, for a certain group of mechanics. At the arbitration hearing and in briefs, the parties focused on the Agreement's recognition clause, the management rights clause, established past practice, and a previous award issued by Arbitrator Dale Allen dealing with a similar dispute. Goodstein clearly understood the positions of the parties – his opinion recites them – and that the parties expected him to decide whether the mechanics were entitled to a paid lunch based on positions submitted by each party. (App. B.)

Nonetheless, Goodstein based his decision on an article of the Agreement, Article XI, Section I(4) ("Section I(4)"), concerning overtime pay, that neither party considered pertinent, much less controlling to the issue of scheduling. Article XI, Section I provides:

> Time and one-half shall be paid for the following:
>
> 1. For all time *worked* in excess of forty (40) hours in any one (1) week;
>
> 2. For all hours *worked* on the holidays specified in this Agreement, in addition to holiday pay if so entitled;
>
> 3. For all time *worked* during a twenty-four (24) hour period on Sunday; and
>
> 4. For all time in excess of eight (8) hours in any one day.

(Emphasis added.) Goodstein concluded that because Section I(4) did not contain the word "worked," any time in excess of eight hours in one day, regardless of whether work is performed, qualified the employee for overtime pay and thus, he ruled that the company was required to pay overtime for scheduled non-work lunch breaks.

Goodstein's misconception can be explained by the fact that neither party had contended at the arbitration hearing that Weyerhaeuser's overtime wage practices had a bearing on the issue submitted and because neither party ever requested Goodstein's "interpretations" of them. Consequently, Goodstein did not have the benefit of a vast compilation of documentary evidence or testimony regarding *eighteen years of past practice* in interpreting and applying the provision. (R. 23, Affidavit of Neal

Sullins, Attachment "B";[1] App. C, Affidavit of Charles Jennings, p. 3; App. D, Supplemental Affidavit of Charles Jennings, pp. 2-3.) Goodstein simply chose to substitute his own unsupported interpretation of an *ambiguous* provision of the Agreement for that term's well-established and commonly understood meaning. Rather than reopen the proceedings, as formally requested by Weyerhaeuser, to receive evidence on the true meaning of Section I(4), the union invoked the doctrine of *functus officio* (i.e., once an arbitrator has made and published his final award his authority is exhausted and he can do no more) thereby nailing shut the door on a decision that did not draw its essence from the Agreement.

Although the district court granted summary judgment in favor of the union concluding that "an arbitrator's decision, drawn from the unambiguous and internally consistent language of a contract must receive great respect by a trial court," the Eighth Circuit Court of Appeal hearing panel unanimously considered the language of Section I(4) to be *ambiguous* and not susceptible to "interpretation" from Goodstein without considering the parties' bargaining history and past administration of the provision. The panel reasoned as follows:

> If Article XI, Section I(4), was an 'unambiguous, and internally consistent' provision, as the district court concluded, we would not fault the arbitrator for applying its plain meaning to the grievance before him. But we cannot agree that this provision is unambiguous. Standing alone,

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[1] The reference to the record by Respondent pertains to Civil Action No. 91-CV-6127 in the Western District of Arkansas.

Article XI, Section I(4), reads, 'time and one-half shall be paid for . . . all time in excess of eight (8) hours in any one day.' There is some ambiguity in that language, but its 'normal interpretation' (to borrow the key phrase in *Lackawanna*) would surely be that it is limited to 'time worked'; in other words, the word 'worked' would be read into the provision, *the opposite of the arbitrator's construction in this case.* When Section I(4) is compared to Sections I(1) through (3), which contained the word 'worked,' the significance of the omission of that word in Section I(4) becomes far more problematic. As the arbitrator implicitly recognized by invoking the all-words-must-have-meaning cannon of construction, Section I(4) becomes materially ambiguous.

Under the *Steelworkers Trilogy*, such ambiguity may only be properly resolved by considering the parties' bargaining history and past practices – the 'industrial common law [that] is equally a part of the bargaining agreement although not expressed in it.' *Warrior & Gulf*, 363 U.S. at 581-582. Thus, when the arbitrator construed this ambiguous provision without seeking the parties' guidance as to its intent and without evidence of their relevant past practices, he acted without considering the entire agreement. In these circumstances, we do not simply disagree with his interpretation of the agreement; we conclude that he dispensed 'his own brand of industrial justice,' and his award cannot be said to 'draw its essence from the collective bargaining agreement.'

App. A-7.

The panel correctly concluded that the "normal interpretation" of Section I(4) was to limit its application to "time worked." Indeed, no employees of Weyerhaeuser have ever been paid overtime for hours in excess of eight not considered "hours worked." There had never been any dispute regarding overtime for time in excess of eight hours in a day until the union attempted to take advantage of Goodstein's misguided solution. Moreover, Weyerhaeuser's method of paying its employees is in compliance with the Fair Labor Standards Act, which does not consider meal periods of thirty minutes or longer compensable "hours worked." 29 U.S.C. § 201, et seq.; 29 C.F.R. § 385.19. In keeping with the panel's decision, the union's petition for rehearing and suggestion for rehearing en banc was denied.

REASONS FOR DENYING THE WRIT

The Court Of Appeal Followed Controlling Eighth Circuit And Supreme Court Precedent In Setting Aside An Egregious Award Based Upon An Ambiguous Contract Provision Without The Benefit Of Testimonial Or Documentary Evidence Regarding Eighteen Years Of Consistent Administration.

The sole function of a court in reviewing a labor arbitration award is to determine whether the arbitrator properly considered the contractual arrangement between the parties when making his decision. *Fairview Southdale Hospital v. Minnesota Nurses Ass'n*, 943 F.2d 809, 811 (8th Cir. 1991). The Supreme Court has consistently reaffirmed the principle of judicial deference to arbitral awards. *United Paper Workers International Union v. Misco,*

Inc., 484 U.S. 29 (1987). The standard of judicial review for an arbitrator's award is whether the award "draws its essence from the collective bargaining agreement, and is not merely the arbitrator's own brand of industrial justice." *Id.* (Quoting from *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). Although the standard is stringent, the Eighth Circuit Court of Appeal has consistently followed the principle set forth by the Supreme Court and held in cases involving ambiguous contract language that an award is not drawn from the essence of the agreement when bargaining history and past practice has not been considered. *United Steel Workers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 579, 581-82 (1960); *John Morrell and Co. v. Local Union 304A*, 913 F.2d 544 (8th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 1683 (S. Ct. 1991); *George A. Hormel & Co. v. United Food & Commercial Workers', Local 9*, 879 F.2d 347, 350 (8th Cir. 1989); *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1423 (8th Cir. 1986), rehearing denied, 817 F.2d 1333 (8th Cir. 1987); *International Union UAW v. White Manor Corp.*, 505 F.2d 1193, 1198-99 (8th Cir. 1974), cert. denied, 421 U.S. 921 (1975).

The union contends in its petition that the panel improperly substituted its own reasoning for that of Goodstein's and failed to apply controlling Eighth Circuit and Supreme Court case law requiring judicial deference to arbitration awards. Essentially, petitioner argues that Section I(4) is unambiguous and thus, Goodstein's interpretation is not susceptible to second guessing by the court. While petitioner has cited several cases concerning the limited role of a court when contract language is

unambiguous, it has presented no Eighth Circuit or Supreme Court authority involving an arbitrator's failure to consider past practice and bargaining history in interpreting an ambiguous contract provision.

Petitioner merely cited one Sixth Circuit and one Seventh Circuit decision in arguing that an arbitrator "may" consider bargaining history and past practice in reviewing an ambiguous provision. The two decisions cited by Petitioner are factually distinguishable from the instant case. In the Sixth Circuit case, the arbitrator had "clearly considered the prior practice of the parties, but found that the language of the agreement was determinative of the issues before him." *Lattimer-Stevens Co. v. United Steelworkers of America*, 913 F.2d 1166, 1170 (6th Cir. 1990). The so-called "permissive approach" (i.e., an arbitrator *may* consider past practice) was set forth in response to the employer's contention that the past practice of the parties had been improperly disregarded – not because the arbitrator failed to seek guidance from the parties regarding past practice. *Id.* at 1170. The Seventh Circuit decision cited by Petitioner simply recognized that an arbitrator "may of course look for guidance from many sources" and in no way concerns a failure to do so when such action is necessary to reach the proper interpretation of an ambiguous provision. *Chicago Newspaper Publishers Ass'n v. Chicago Printing Pressman's Union*, 821 F.2d 390, 394 (7th Cir. 1987). Despite Petitioner's contentions, the Eighth Circuit panel did recognize the principle set forth in *Lattimer-Stevens* and stated in its opinion that, "had the parties submitted evidence and conflicting argument as to the proper construction of this provision, we

would be required to enforce this [Goodstein's] interpretation." App. A-5. Clearly, Petitioner's reliance upon the Sixth and Seventh Circuit decisions is misplaced.

Petitioner's consistent approach to this dispute has been to ignore the "irrefutable proof" offered by Weyerhaeuser to Goodstein to establish that Section I(4) had always been applied as if the word "worked" had been included. Needless to say, Petitioner would have this Court believe that the Eighth Circuit panel had no business determining whether, in its view, Section I(4) is ambiguous. However, in *John Morrell, supra,* the Eighth Circuit stated succinctly in considering a union's attempt to reverse a district court decision vacating an arbitrator's award that *"we believe that deciding whether contractual language is ambiguous is a question of law which we review de novo . . . "* (emphasis added). *Morrell,* 913 F.2d at 550. In the case *sub judice,* the Court of Appeal panel did just that and once it was determined that the provision is ambiguous, the court followed numerous Eighth Circuit decisions establishing that Goodstein should have considered relevant extrinsic evidence prior to interpreting Section I(4). *Id.* at 559-661, fn. 13. *Warrior & Gulf Nav. Co.,* 363 U.S. 574, 579 (1960); *Hormel,* 879 F.2d 347, 350 (8th Cir. 1988); *Trailways Lines,* 807 F.2d 1416, 1423 (8th Cir. 1986); *White Motor Corp.,* 505 F.2d 1193, 1198-99 (8th Cir. 1974), cert. denied, 421 U.S. 921 (1975).

While it is recognized that a review of an arbitration award is extremely limited, when an obtuse interpretation of contract language is forwarded and is commensurate with dispensing one's own brand of industrial justice, there should be no question that it is proper for a court to reach beyond a party's "closed door" approach

in order to determine the correct construction of a provision. In doing so, the panel followed Supreme Court and Eighth Circuit precedent, including *Hormel, supra,* a case in which the arbitrator had made several unsupported assumptions without considering additional facts that strongly indicated that the award did not draw its essence from the contract. *Hormel,* 879 F.2d at 351-52. Just as the Eighth Circuit correctly ruled that Goodstein should have sought guidance from the parties as to the meaning of Section I(4), the *Hormel* court vacated an arbitrator's award because he failed to take into consideration "evidence of prior negotiations that was essential to ascertain the rights and obligations of the parties under the current contract." *Hormel,* 879 F.2d at 351-52.

The union contends in its petition that the arbitration system is "threatened" by the Eighth Circuit's decision and if upheld, an arbitrator's award is final no more. Such an argument is simply not correct. In keeping with the Supreme Court decision in *Misco,* the Eighth Circuit ruling merely remanded the case to the arbitrator so that he can consider evidence on the correct meaning of Section I(4) – an option so vigorously opposed by the union that it invoked "functus officio" despite the fact that Goodstein's interpretation was in direct conflict with the provision's consistent application for over eighteen years. *Misco,* 484 U.S. at 40, n. 10. The real threat present in this dispute is the injustice that would result if Weyerhaeuser were not given its "day in court" and the opportunity to establish the proper construction of Section I(4).

CONCLUSION

The Court of Appeal's decision that Goodstein's award be vacated and the case remanded to the arbitrator for further proceedings under the agreement is consistent with Supreme Court and Eighth Circuit precedent. Although the union has argued that Section I(4) is unambiguous, the Court of Appeal's analysis convincingly establishes that the provision is materially ambiguous – thus, Goodstein did not consider the entire agreement when he interpreted Section I(4) without seeking the parties' guidance as to its intent and without evidence of relevant past practice. In other words, Goodstein dispensed "his own brand of industrial justice," and his award cannot be said to "draw its essence from the collective bargaining agreement." App. A7. Accordingly, Weyerhaeuser submits that the union's petition for writ of certiorari should be denied.

Respectfully submitted,

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Date: May 9, 1994

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-3709

International Woodworkers of America, U.S. AFL-CIO, and Its Local 5-15, Plaintiffs – Appellees, v. Weyerhaeuser Company, Defendant – Appellant.	* * * * * * * * * * * *	Appeal from the United States District Court for the Western District of Arkansas.

Submitted: June 18, 1993
Filed: October 12, 1993

Before WOLLMAN and LOKEN, Circuit Judges, and HUNTER,* Senior District Judge.

LOKEN, Circuit Judge.

Weyerhaeuser Company ("Weyerhaeuser") appeals a district court order enforcing an arbitration award issued in favor of the International Woodworkers of America

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* The HONORABLE ELMO B. HUNTER, Senior United States District Judge for the Western District of Missouri, sitting by designation.

and its Local 5-15 (collectively, the "Union"). We vacate the award because it did not draw its essence from the collective bargaining agreement.

I.

The arbitration at issue arose under the single collective bargaining agreement between Weyerhaeuser and Local 5-15 covering various Weyerhaeuser facilities in Arkansas and Oklahoma (the "Agreement"). For over twenty years, Weyerhaeuser paid certain maintenance workers covered by this Agreement for their one half-hour lunch breaks because they were expected to work during lunch as the need arose. Since these employees otherwise worked an eight hour schedule, this policy assured them one half-hour of overtime pay on most work days.

On March 28, 1989, Weyerhaeuser instituted a new policy – or work schedule change, as the Company called it – giving these maintenance employees unpaid half-hour lunch breaks during which they could leave the company premises and were not expected to work. Various employees filed grievances, contending that this unilateral change in past practice was a breach of the collective bargaining agreement. Weyerhaeuser denied the grievances, and the parties proceeded to arbitration under Article VII of the Agreement providing that, "The Arbitrator shall have no power to add to or subtract from or modify any of the terms of this Agreement."

Before the arbitrator, the Union submitted evidence that the practice of paid lunch breaks had continued over the course of numerous prior agreements. Relying upon

the favorable decision of another arbitrator on a similar issue, the Union argued that the practice had become an economic benefit under the Agreement and therefore Weyerhaeuser's unilateral termination of that benefit violated its duty under Article I of the Agreement "to negotiate with the Union any changes in employee benefits that it wishes to make." Weyerhaeuser responded that its action was consistent with its prerogatives under the "Management's Rights" provisions in the Agreement and that the prior award was clearly wrong and, in any event, was not binding in this arbitration.

The arbitrator decided in favor of the Union, awarding affected employees back pay for their unpaid lunch periods from March 28, 1989, without interest. Ignoring the arguments made by the parties, the arbitrator based his decision upon Article XI, Section I, of the Agreement, which provides:

> Time and one-half shall be paid for the following:
>
> 1) For all time worked in excess of forty (40) hours in any one week.
>
> 2) For all hours worked on the holidays specified in this Agreement in addition to holiday pay if so entitled.
>
> 3) For all time worked during the twenty-four (24) hour period on Sunday.
>
> 4) For all time in excess of eight (8) hours in any one day.

The arbitrator reasoned that the presence of the word "worked" in the first three clauses of Section I and its

absence from clause 4 was dispositive. Invoking the principle that all words in a contract must have meaning, the arbitrator concluded:

> [I]n this one overtime provision alone [clause 4], the hours in excess of 8 in one day are not hours that are required to be worked. Rather, any time in excess of 8 hours in one day, that the employee is required to be at the Employer's place of business, qualifies the employee for overtime pay.

Therefore, "Section I of Article XI expressly provides for overtime pay for those employees who have 'time' at the plant, at the request of the Company, in excess of 8 hours in any one day," and Weyerhaeuser must continue to pay overtime for the scheduled lunch breaks regardless of whether work is required.

Weyerhaeuser petitioned to reopen the proceedings. Noting that neither party had suggested that Article XI, Section I(4), provided a basis for resolving the dispute, Weyerhaeuser stated that it could offer "irrefutable proof" that omission of the word "worked" from that provision was a clerical error in the original 1973 collective bargaining agreement and that both parties had consistently interpreted the provision as referring only to time worked. The arbitrator refused to reopen, stating that his issuance of the award rendered him *functus officio*.[1]

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[1] Under the doctrine of *functus officio*, "once an arbitrator has made and published a final award his authority is exhausted, and he . . . can do nothing more in regard to the subject matter of the arbitration." *La Valle Plaza, Inc. v. R.S.*

The Union commenced this action seeking enforcement of the award, and Weyerhaeuser urged the district court to vacate. The district court granted summary judgment in favor of the Union, concluding that, "An arbitrator's decision, drawn from the unambiguous, and internally consistent language of a contract must receive great respect by a trial court." On appeal, Weyerhaeuser argues that the arbitrator went beyond this contractual authority, and failed to draw his award from the Agreement, when he relied upon an ambiguous provision not addressed by the parties.

II.

We agree with the district court that the scope of judicial review of arbitration awards under collective bargaining agreements is extremely limited:

> The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on error of fact or on misinterpretation of the contract. . . . As long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice," the award is legitimate.

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 36 (1987), quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Thus, we must determine whether the arbitrator's award in this

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Noonan, Inc., 378 F.2d 569, 572 (3d Cir. 1967). *See Domino Group, Inc. v. Charlie Parker Memorial Found.*, 985 F.2d 417, 420-21 (8th Cir. 1993).

case "draws its essence from the collective bargaining agreement."

The "essence" of a collective bargaining agreement cannot always be divined by the same process that a court uses in construing a more typical commercial contract. As the Supreme Court explained in its landmark *Steelworkers Trilogy*, "The collective agreement covers the whole employment relationship. It calls into being a new common law – the common law of a particular industry or of a particular plant." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960). Therefore, "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." *Id.* at 581-82.

In this case, the arbitrator based his award on Article XI, Section I(4), of the Agreement. In interpreting this provision, the arbitrator employed a purely textual analysis, relying on the absence of the word "worked" in Section I(4), its presence in Sections I(1)-(3), and the principle that each word in a contract must be given meaning. Had the parties submitted evidence and conflicting argument as to the proper construction of this provision, we would be required to enforce this interpretation. In labor arbitration, "It is the arbitrator's construction which was bargained for." *Enterprise Wheel*, 363 U.S. at 599. Therefore, "an [arbitrator's] interpretation of the literal language of the disputed provision . . . obviously draws its essence from the collective bargaining agreement." *United Food & Commercial Workers, Local No. 222 v. Iowa Beef*

Processors, Inc., 683 F.2d 283, 285 (8th Cir.), *cert. denied*, 459 U.S. 1088 (1982).

But in this case the parties did not address Article XI, Section I(4), in the evidence and argument they submitted to the arbitrator. By their silence, the parties represented to the arbitrator that this provision did not afford a basis for resolving this dispute. More significantly, the absence of evidence on the question deprived the arbitrator of the "industrial common law" surrounding this part of the Agreement – its negotiating history, relevant past practices of the industry and shop, and other extrinsic indicia of the parties' intent.

Weyerhaeuser argues that the arbitrator exceeded his authority by basing his award on a provision of the Agreement not addressed by the parties. But we held to the contrary in *Lackawanna Leather Co. v. United Food & Commercial Workers Int'l Union*, 706 F.2d 228, 230-32 (8th Cir. 1983) (en banc), where we upheld an award that was based upon the arbitrator's "normal interpretation" of a provision "common in collective bargaining agreements." *Lackawanna* thus establishes that the arbitrator acted within his authority in considering the entire Agreement before deciding the grievance submitted to him. The question remains, however, whether his award drew its essence from that Agreement.

We have repeatedly applied the Supreme Court's teaching that labor arbitrators must consider the parties' past practices and "the common law of the shop" in interpreting collective bargaining agreements. In *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1423 (8th Cir. 1986), we affirmed the vacating of an

award because the arbitrator had ignored the "law of the shop," had failed to discuss a relevant contract provision, and had simply copied from his decision in a previous case. In *International Union UAW v. White Motor Corp.*, 505 F.2d 1193, 1198-99 (8th Cir. 1974), *cert. denied*, 421 U.S. 921 (1975), we enforced an award because the arbitrator had properly considered the parties' bargaining history and prior agreements in concluding that the absence of an attachment to the collective bargaining agreement was an inadvertent omission. *See also Fairview Southdale Hosp. v. Minnesota Nurses Ass'n*, 943 F.2d 809 (8th Cir. 1991) (arbitrator properly relied upon past conduct in construing ambiguous provision).

If Article XI, Section I(4), was an "unambiguous, and internally consistent" provision, as the district court concluded, we would not fault the arbitrator for applying its plain meaning to the grievance before him. But we cannot agree that this provision is unambiguous. Standing alone, Article XI, Section I(4), reads, "Time and one-half shall be paid for . . . all time in excess of eight (8) hours in any one day." There is some ambiguity in that language, but its "normal interpretation" (to borrow the key phrase in *Lackawanna*) would surely be that it is limited to "time worked"; in other words, the word "worked" would be read into the provision, *the opposite of the arbitrator's construction in this case.* When Section I(4) is compared to Sections I(1)-(3), which contain the word "worked," the significance of the omission of that word in Section I(4) becomes far more problematic. As the arbitrator implicitly recognized by invoking the all-words-must-have-meaning canon of construction, Section I(4) becomes materially ambiguous.

Under the *Steelworkers Trilogy*, such ambiguity may only be properly resolved by considering the parties' bargaining history and past practices – the "industrial common law [that] is equally a part of the bargaining agreement although not expressed in it." *Warrior & Gulf*, 363 U.S. at 581-82. Thus, when the arbitrator construed this ambiguous provision without seeking the parties' guidance as to its intent and without evidence of their relevant past practices, he acted without considering the entire agreement. In these circumstances, we do not simply disagree with his interpretation of the Agreement; we conclude that he dispensed "his own brand of industrial justice," and his award cannot be said to "draw its essence from the collective bargaining agreement."

Accordingly, without deciding the merits of the underlying grievance, we vacate the arbitrator's award. The judgment of the district court is reversed and the case is remanded with instructions to remand to the arbitrator for such further proceedings as the collective bargaining agreement may permit. *See Misco*, 484 U.S. at 40 n.10.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE MATTER OF ARBITRATION BETWEEN	§	FMCS #91-03643
WEYERHAEUSER COMPANY (MID-SOUTH WOOD PRODUCTS)	§	GRIEVANCES: #89-WCPM-38 #89-WCMT-29, 30, 31&34
AND	§	GRIEVANTS: MAINTENANCE EMPLOYEES (PINE MERCHER, HARDWOOD MERCHER, HARDWOOD SAWMILL, PINE LUMBER & PLYWOOD)
INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, LOCAL 5-15	§	

****

HEARING HELD ON MAY 16, 1991, AT THE PALACE RESTAURANT, DE QUEEN, ARKANSAS, WITH NEAL SULLINS, SENIOR ATTORNEY FOR THE COMPANY, REPRESENTING THE COMPANY; RANDALL RICE, VICE-PRESIDENT OF THE INTERNATIONAL UNION, REPRESENTING THE LOCAL UNION; THE LOCAL UNION REPRESENTING ALL THE GRIEVANTS COVERED BY THE GRIEVANCES COMBINED FOR THIS HEARING, BEFORE BARNETT M. GOODSTEIN, IMPARTIAL ARBITRATOR, SELECTED THROUGH THE PROCEDURES OF THE FMCS, WASHINGTON, D.C.

BACKGROUND

The Company operates a large manufacturing complex at Wright City, Oklahoma, and has other facilities at

locations in Arkansas. All of these operations are combined for purposes of collective bargaining, and there is one Agreement between the Company and Local 5-15 of the IWA covering all of the locations in Arkansas and Oklahoma. These Grievances, all combined and heard as one Grievance herein, cover Maintenance Employees who work at the Pine Mercher, Hardwood Mercher, Hardwood Sawmill, Pine Lumber & Plywood Plants within the Company's manufacturing complex.

The various plants at Wright City, Oklahoma process logs for manufacture; and the conversion of logs into pine lumber, hardwood lumber, and pine plywood. Certain of the Maintenance Employees work in one department only; however, those in the "Maintenance and Electrical" Department, and those in the "Filing and Grinding" Department provide maintenance services through the entire complex, servicing all departments.

For some time prior to March 28, 1989, certain of the Maintenance employees who work at the various plants in Wright City, had observed a practice of eating their lunch while they were working, or when they could, depending upon their work load, and were paid for the time period as observed by these employees as a "lunch period." Over a more than 20-year period, this practice seems to have been changed by the Company at various times, and was not a practice that was made available to all the Maintenance employees at all times.

On March 28, 1989, the Company sent a Memorandum to all Maintenance employees at Wright City, and to their Supervisors, notifying them that all maintenance employees thereafter, "will have a scheduled non-paid

lunch break. The supervisors in these areas will schedule each individual's lunch period. This is a scheduled lunch period and employees may eat lunch on or off the premises."

As a result of this Memorandum to the maintenance employees, various groups of such employees filed Grievances over this unilateral change in their previous paid lunch period, on March 28, March 30, April 6 and April 19, 1989, all requesting that the Company not reschedule their lunch periods for the sole purpose of avoiding the payment of overtime pay to these employees, in violation of the Collective Bargaining Agreement, and that they be paid back pay for all the unpaid lunch periods since the March 28 Memorandum. The Company responded in each case that, "Scheduled non-work lunch periods is not a violation of the labor agreement," and denied all the Grievances. They were processed through the Grievance Procedure to arbitration.

ISSUE

DID THE COMPANY VIOLATE THE COLLECTIVE BARGAINING AGREEMENT ON AND AFTER MARCH 28, 1989, WHEN IT CEASED PAYING LUNCH PERIODS FOR THOSE MAINTENANCE EMPLOYEES WHO HAD BEEN RECEIVING SUCH PAYMENTS PRIOR TO THAT DATE? IF SO, WHAT SHALL BE THE APPROPRIATE REMEDY THEREFORE?

OPINION OF THE ARBITRATOR

The Union contends that the Company had established a past practice of paying its Maintenance and Electrical employees at its Wright City, Oklahoma plants, a 30-minute lunch break. When the Company stopped this practice, unilaterally, and without negotiation with the Union, it violated the Collective Bargaining Agreement. The Union's arguments are based on the Fact that Article I of the Agreement (Recognition) places upon the Company "the obligation to negotiate with the Union any changes in employer benefits that it wishes to make."

The Union contends that paid lunch breaks are a benefit to the employees, and once having been given to the employees, cannot be then unilaterally taken away from those employees. The Union argues that, since the practice continued, with only short interruptions for certain maintenance employees, for over 20 years, and many Labor Agreements were negotiated during that period, with no change having been negotiated in any of those Agreements concerning the paid lunch periods, that economic benefit now has become a part of the Labor Agreement. Therefore, it can be changed only by negotiation between the Company and the Union, and cannot be unilaterally changed by the Company, as it did on Mach 28, 1989.

The Company responds to this Union argument by contending that the Company has the contractual authority to change custom and past practice. The Company argues that the Contract is "clear and unambiguous," and that it specifically gives to the Company the right to change current practices, and not to be bound by past practices. The Company contends that, since there is no

"maintenance of standards" clause in the Labor Agreement, and since the Management Rights Clause gives the Company the express right to change past practices, it is not bound by the past practice of paid lunch periods.

The Company cites Section II of Article II (Management's Rights) to prove its point. This Section, as quoted by the Company, reads as follows: "The Company specifically reserves the right to, in accordance with its judgment . . . make or change rules, policies and practices *not in conflict with the provisions of this agreement.*" (emphasis added by the arbitrator)

Thus, both parties appear to agree that there was a past practice by the Company of paying certain Maintenance employees for lunch period during their respective shifts. Moreover, the Company defends its right to have paid lunch periods for many years, and then unilaterally change that practice, by the provisions of Section III of Article II of the Agreement. That Section provides, in pertinent part, that the Company does not waive its right to exercise any function reserved to it by not exercising that function for any particular period of time, "or preclude the Company from exercising the same in some other way not in conflict with the express provision of this Agreement."

Thus, the Management Rights Article gives the Company certain definite rights to exercise, so long as the exercise of those rights is "not in conflict with the provisions of this agreement." Moreover, the Company is not restricted in this exercise, even though not exercised for long periods of time, so long as its exercise is "not in conflict with the express provision of this Agreement." In

addition, the Company argues that "there is absolutely no language, express or implied, contained in the Labor Agreement concerning a paid lunch period."

There are, however, express provisions contained in the Labor Agreement that cover payment for certain hours in excess of 8 in a day, or 40 in a week, or on Saturdays, Sundays or Holidays (Article XI – Overtime and Premium Pay). The provisions of Article XI my be more important to this discussion, and the Grievances covered by this hearing, than the contentions of both parties concerning past practice, and its affect on the benefits of the employees, or the rights of Management under the Agreement.

The Company is correct in pointing out to this arbitrator that the provisions of Article VII (Grievance Procedures) of the Labor Agreement provide, in Section II, that "The Arbitrator shall have no power to add to or subtract from or modify any of the terms of this Agreement. . . . " This arbitrator is well aware of that mandate and prohibition, and believes in a strict construction of the Agreement itself, and all its provisions.

Whether or not the arbitral opinions of various arbitrators, concerning the force and effect of Past Practice, and whether or not such practices can, or do, become a part of the Labor Agreement under certain circumstances, cannot even be reached in this case, if the express provisions of the Agreement provide the resolution of this Grievance without discussions of the Past Practice issue.

Article XI of the Agreement governing this Grievance, and the interpretation of this Agreement to resolve the differences between the parties, may well cover the

very issue, or issues, involved in all the Grievances that here have been combined to be heard as one Grievance herein.

Section I of Article XI provides that "Time and one-half *shall* be paid for the following (emphasis added):

"1) For all *time worked* in excess of forth (40) hours in any one week. (emphasis added)

"2) For all *hours worked* on the holidays specified in this Agreement in addition to holiday pay if so entitled. (emphasis added)

"3) For all *time worked* during the twenty-four (24) hour period on Sunday. (emphasis added)

"4) For all *time* in excess of eight (8) hours in any one day. (emphasis added)

It is an axiom of industrial relations that all the words in a Labor Agreement have a meaning: they were placed there, or used, for some particular purpose.

In the provision for overtime in excess of 40 hours in one week, the requirement is for all "time worked." In the provision for overtime for holidays, the requirement is for all "hours worked" on such holidays. For overtime on Sundays, there is a requirement of all "time worked" during the 24-hour period on Sunday. However, for overtime in excess of 8 hours in any one day, the only requirement is for "all *time* in excess of" 8 hours in a day. (emphasis added)

In each of the first three provisions, the words, "time worked," or "hours worked," is a requirement for overtime pay. Only in the case of overtime worked in excess

of 8 hours in one day is the provision for "time," and the word, "worked" is not included in that provision. Therefore, in this one overtime provision alone, the hours in excess of 8 in one day are not hours that are required to be worked. Rather, any time in excess of 8 hours in one day, that the employee is required to be at the Employer's place of business, qualifies the employee for overtime pay. However, the Agreement specifically provides that hours shall not be pyramided for the purposes of payment of overtime pay. Nevertheless, the preamble to Section I of Article XI specifically provides that overtime "shall" be paid for "all time in excess of eight (8) hours in any one day."

The parties introduced into evidence Joint Exhibit 4 that appears to be a Memorandum for Management to the president of the IWA Local at Wright City. That Memorandum indicates that, before the scheduled change for a lunch break, the "typical maintenance employee" would work from 7:00 a.m. to 3:30 p.m. from Monday through Friday, and from 6:00 a.m. to 3:30 p.m. on Saturday. That is a period of 8½ hours during the week days, and 9½ hours on Saturday (with one week day off if the employee was to work on Saturday). The Memo indicates, further, that the employee would work and/or be paid for 8½ for days assigned from Monday through Friday, and for 9½ hours on Saturday.

The same Memorandum then shows how the pay schedule would be handled after the unpaid lunch period was scheduled. The hours on each shift continue to be the same; i.e., 8½ hours per shift on Monday through Friday, and 9½ hours on Saturday. However, the hours now being paid would be 8 per day on Monday through

Friday and 9 on Saturday. This difference is due to the unpaid lunch period of 30 minutes daily.

The parties introduced Joint Exhibit 5 that covers the work schedules of "maintenance personnel assigned to plywood." (Joint Exhibit 4 covered all other maintenance personnel, plywood schedules being different). This schedule indicates that, prior to March 28, 1989, maintenance employees in the plywood plant worked from 6:00 a.m. to 2:00 p.m. on Monday through Friday (with one scheduled day off), and worked from 6:00 a.m. to 3:30 p.m. on Saturday. These employees worked an 8-hour shift during the week-days, and a 9 1/2 shift on Saturday. The Exhibit indicates that they were paid for 8 hours for Monday through Friday, and for 9 hours on Saturday (however, they show to have worked for 9 1/2 hours on Saturday).

After the March 28, 1989 change in their work schedules, for the unpaid lunch period, the hours changed on Monday through Friday to: 6:00 a.m. to 2:30 p.m. (unchanged on Saturday). However, payment for these hours now was unchanged at 8 hours per day for week days, and at 9 hours for Saturdays worked. However, now the plywood maintenance employees were at the plant an extra one-half hour (8 1/2) per day during the week, and the same 9 1/2 hours on Saturday.

According to Article XI of the Agreement, all "time in excess of eight (8) hours in any one day," should have been paid by the Company at the rate of 1 1/2 times the regular hourly rate of the individual employee. It appears from these two Joint Exhibits that such was not the case, and the "typical" maintenance employee worked the

same number of hours as before; i.e., 8 1/2 hours (including lunch break), but after March 28, 1989, was paid only for 8 hours, in violation of Article XI of the Agreement. The maintenance employees in the plywood plant were required to work an additional 30 minutes during the week, for which they were paid nothing, and continued to work 9 1/2 hours on Saturday, but were paid only for 9 hours, again in violation of Article XI of the Agreement.

It is obvious to this arbitrator that the change made by the Company on March 28, 1989, was in direct contravention of, and conflict with, the express provisions of the Agreement. The employees who worked, and/or who were at the Employer's place of business, and ready, willing and able to work, were not being paid in accordance with the overtime provisions of the Agreement (over 8 hours in a day).

The Company contends that there is nothing in the Labor Agreement, either express or implied, "concerning a paid lunch period," I cannot agree. Section I of Article XI expressly provides for overtime pay for those employees who have "time" at the plant, at the request of the Company, in excess of 8 hours in any one day. Those employees are not being paid in accordance with the express terms of the Agreement.

The Union alleged that the Company was in violation of the Labor Agreement for not so paying its employees overtime pay. The Grievances allege that the Company violated Article XI (overtime pay) "and all applicable" provisions of the Agreement. Ample proof was introduced in evidence to prove that the Company is not

paying its Maintenance employees in accordance with Article XI of the Agreement.

The Company contends that this arbitrator is not bound by the prior award of Dr. A. Dale Allen. I agree. If the prior award of another arbitrator is "clearly erroneous," a subsequent arbitrator is not bound by the award of the previous arbitrator. I agree, also, that arbitration awards do not have the same doctrinal force – insofar as the doctrines of stare decisis and res judicata are concerned – as have the judicial decisions in appellate judicial forums.

In proof of this argument, the Company quotes from a maxim set forth by former Supreme Court Justice William O. Douglas, stated as follows: "An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." I agree completely with this maxim. However, my opinion and award do not follow that of Professor Allen in the case submitted as Joint Exhibit 6, as his award seems to be based almost, if not, entirely on the argument of Past Practice, and it becoming an integral part of the Labor Agreement, under certain circumstances. My own opinion and award are not concerned with the issue of Past Practice. Rather, they draw their essence directly from a specific provision of the Agreement itself; one that has been negotiated and agreed upon by both parties to the said Agreement, and one that is binding upon both such parties.

The Company relies heavily on Section III of Article II (Management's Rights Clause) of the Labor Agreement.

The Company cites that part of the Agreement that provides that the Company is not precluded from exercising any function reserved to it in the Agreement "in some other way not in conflict with the express provisions of this agreement." However, as I have shown above, the Company did exercise this function (of scheduling an unpaid lunch period during the Maintenance employee's regularly-scheduled shift.) If the Company keeps the employee at the plant for more than 8 hours in any one day period, then it must pay that employee for all hours over 8 at the overtime rate. It has not done so.

The Company then cites from the Elkouri book. HOW ARBITRATION WORKS, as follows:

> "Ordinarily all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning, and it will not be declared surplusage if a reasonable meaning can be given to it consistent with the rest of the agreement."

This arbitrator follows this reasoning by the Elkouris, and has given each word in Section II of Article XI the meaning that appears to be that intended by the parties. If a certain word is used by the parties in their Agreement, then, certainly, the omission of a certain word – in the context of the other words so used – must have some meaning as well. Since the parties chose to use the words, "time worked," or "hours worked," in three of the four provisions of Section II of Article XI, then there must have been some valid, logical reason that the parties chose to drop the word "worked" from the fourth such provision. In any event, they negotiated the wording of that said Section, and that cannot be ignored.

Since the thrust of the Company's Brief, filed in this matter, seems to be that of discounting the Allen Award; of showing that it was not a correct award; that it did not draw its essence from the Agreement; and that it was made without benefit of some important and relevant facts and considerations, I will spend no more time in an effort to distinguish this opinion and award from that of Dr. Allen. Suffice it to say, we have approached the issue of scheduled unpaid lunch periods from an entirely different point of view. Therefore, I am not concerned with the validity of Dr Allen's findings of fact, his conclusions, or of his-award. My own award must stand on its own merits, based upon my reasoning as expressed herein.

The Grievances request the payment of all hours after March 28, 1989, for which the Company refused to pay due to the scheduling of unpaid lunch periods to the covered Grievants. I have found these Grievants are entitled to such back pay award. However, the Grievants also request this arbitrator to grant them interest on their back pay award. Interest on back pay awards usually is granted, if and when it is so granted, as a form of punishment. Such punishment is meted out in the event the arbitrator finds the Company, in this instance, to have acted arbitrarily, capriciously or maliciously. This arbitrator cannot find that the Company here has been guilty of any of those transgressions. Rather, I find that the Company is honest and earnest in its belief that its interpretation of the Agreement is the correct interpretation. The Company sincerely believes that Dr. Allen's award was incorrect and wrong. However, just because the Company failed to note the difference in the overtime provisions of Section I of Article XI does not prove that the Company

acted in complete disregard of the rights and privileges of the Grievants, or in disregard of its obligations under the Agreement. The Company merely has a different interpretation of the Labor Agreement than does this arbitrator, as applies to the issue in question. No interest will be awarded.

AWARD OF THE ARBITRATOR

The Issue: DID THE COMPANY VIOLATE THE COLLECTIVE BARGAINING AGREEMENT ON AND AFTER MARCH 28, 1989, WHEN IT CEASED PAYING LUNCH PERIODS FOR THOSE MAINTENANCE EMPLOYEES WHO HAD BEEN RECEIVING SUCH PAYMENTS PRIOR TO THAT DATE? IF SO, WHAT SHALL BE THE APPROPRIATE REMEDY THEREFORE? is answered in the affirmative. The Company did so violate Section I of Article XI of the Agreement. The Grievance, therefore, is sustained and the Company is directed to pay the affected employees their back pay for all time in excess of 8 hours in any day, Monday through Saturday, that each Grievant herein was scheduled to work on and after March 28, 1989, but no interest shall be due or payable thereon.

/s/ Barnett M. Goodstein
Barnett M. Goodstein
Arbitrator

4230 LBJ Freeway, Suite 121
Dallas, Texas 75244
(214) 387-4303

July 24, 1991

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

INTERNATIONAL WOODWORKERS OF AMERICA, U.S., AFL-CIO, AND ITS LOCAL NO 5-15, Plaintiffs/Counter-Defendant v. WEYERHAEUSER CO., Defendant/Counter-Plaintiffs	CIVIL ACTION NO. 91-6127

AFFIDAVIT OF CHARLES JENNINGS

BEFORE ME, the undersigned authority at law, did personally appear Charles Jennings, and after being duly sworn and based upon personal knowledge, he did depose and say the following:

I, Charles W. Jennings, am employed by Weyerhaeuser Company ("Company") as Labor Relations Director for the Southwest Region. I have been involved in labor relations work for Weyerhaeuser since 1969 and corporate labor relations since 1971. Since October, 1970, the Company had consecutive collective bargaining agreements with the International Woodworkers of America Local 5-15 ("Union"). I have been directly involved in all aspects of those labor agreements. In 1973,

I shared the responsibility of negotiating the labor agreement on behalf of the Company with Mr. David Reynolds. In 1976, 1979, 1982, 1985, 1988, and 1991 I had full responsibility for negotiating a labor agreement on behalf of the Company and served as its chief spokesman through the entire process.

The Goodstein Arbitration Award

As the Labor Relations Director for the Southwest Region, I was directly involved in the decision to change the work schedule and hours of work of some of its employees to include a non-paid 30-minute period, effective March 28, 1989. The decision affected certain maintenance employees, who prior to March 28, 1989, worked 8 1/2 hours per day. Pursuant to the change, these individuals were no longer paid for 8 1/2 hours per day as they were required to take a full 30-minute lunch period during which no work was to be performed. However, if occasion did arise for these individuals to perform work during any part of the 30-minute lunch period, they were to be paid at time and one-half for that half hour. The change only concerned certain employees in the maintenance department, as most other individuals had been working subject to an unpaid lunch period since the first labor agreement was entered in 1970.

Arbitrator Goodstein issued his decision on July 24, 1991, and based his decision solely on Article XI, Section I(4) which provides "time and one-half shall be paid for the following: . . . (4) for all *time* in excess of (8) hours in any one day. (Emphasis added)." The language in Article XI, Section I, first appeared in the 1973 labor agreement. I

was personally involved in the 1973 negotiation as the Company's Assistant Labor Relations Manager for the Southern Region. The intent of the agreement then, as now, is that time refers to "hours worked." Although the 1973 labor agreement, Article XI, Section I(4), did not contain the word "worked," the omission was recognized by the parties and the provision was administered as if the word "worked" was included. Since the intent and administration were consistent and correct since 1973, there was no need to revise the provision. Mr. Rice states in his affidavit that it was never the intent of the parties that the word "worked" be included, yet he was not involved in the 1973 negotiation, nor was he even employed by the Company at the time. Further, Mr. Rice states in his affidavit that he was the negotiator for the union in 1982, 1985, and 1991, yet he simply served as a member of the union's bargaining committee, and has never filled the position of spokesman or chief negotiator in those negotiations with the Company. Moreover, I am not aware of any arbitrations dealing specifically with this issue and based on my position, I would be aware of such arbitrations. To the contrary, the language has always been interpreted and administered without dispute by the Union, to apply only to hours worked.

The Giles Arbitration Award

In my capacity as Labor Relations Director, I appeared and testified at the arbitration hearing held April 25, 1991, before Arbitrator James B. Giles. The arbitration concerned an alleged violation of the contract whereby the Company began assigning entry level

employees to perform overtime cleanup work. The grievance alleged that the overtime work should have been performed by employees within the classification, by seniority, in the area where the work was to be performed. The grievance and arbitration was limited in scope to assignments made in the Planer Department.

The grievance arose when cleanup assignments were made during *straight time* hours because the Company had been experiencing substantial periods of down time. All cleanup assignments during these straight time hours were given to employees in the Planer Department. Cleanup work during overtime hours in the Planer Department have always been assigned as follows:

1. Base rated entry-level employees within the planer department, by seniority; if additional help is necessary,
2. Operators or job bid holders within the planer department, by seniority; if additional help is necessary,
3. Any entry-level employee within the planer department, by seniority, until enough manpower is obtained.

Overtime cleanup work in the planer department has at all times prior to the filing of the grievance, since the filing of the grievance, and at all times after the arbitration award, been assigned to individuals within the Planer Department. I have read Arbitrator Giles' award and understand the ruling to give overtime cleanup work to employees with "planer classification." While there is no one planer classification, all overtime cleanup work has been assigned to employees in the Planer Department and therefore, to the best of my understanding and

knowledge, the Company has complied with the award. Because all assignments were made to employees with Planer Department classifications, and based upon my understanding of Arbitrator Giles' award, there is no back pay liability due.

I have read the above and foregoing consisting of five pages and it is true and correct to the best of my knowledge.

/s/ Charles W. Jennings
CHARLES W. JENNINGS

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 10 DAY
OF July, 1992

/s/ Regina M. Miller
NOTARY PUBLIC

My Commission Expires 5-13-95

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

INTERNATIONAL WOODWORKERS OF AMERICA, U.S., AFL-CIO, AND ITS LOCAL NO 5-15, Plaintiffs/Counter-Defendant v. WEYERHAEUSER CO., Defendant/Counter-Plaintiffs	CIVIL ACTION NO. 91-6127

SUPPLEMENTAL AFFIDAVIT OF CHARLES JENNINGS

BEFORE ME, the undersigned authority at law, did personally appear Charles Jennings, and after being duly sworn and based upon personal knowledge, he did depose and say the following:

I, Charles W. Jennings, am employed by Weyerhaeuser Company ("Company") as Labor Relations Director for the Southwest Region. I previously provided an affidavit in support of Defendant's Counter Plaintiffs' Cross-Motion for Summary Judgment. In my original affidavit, I discussed Arbitrator Barrett M. Goodstein's ("Goodstein") conclusions regarding the Company's decision to alter the work schedule and hours of work for certain maintenance employees. In doing so, I explained

that Goodstein based his findings on an incorrect interpretation of the overtime provisions of the labor agreement, Article XI, Section I(4). Goodstein interpreted this provision without the benefit of testimonial or documentary evidence, or briefing by either party during any stage of the arbitration proceeding. During the proceeding, it was apparent that neither the Company nor the Union considered Article XI, Section I(4) as central to issue litigated.

In his second affidavit, Mr. Randall Rice, Vice President for the International Woodworkers of America, states that the union did consider Article XI, Section I(4), in its grievance as the basis for its position that there was a violation of the Agreement. (Second affidavit of Randall Rice, page 2.) Such a contention is less than a candid statement of fact. The grievance that was filed by the union did identify Article XI, along with Article XXVI, and all applicable past practice, but did not specifically cite Article XI, Section 1(4) in support of its position as Mr. Rice suggests. In fact, the nature of the grievance as stated by the union was rescheduling. (See true and correct copy of grievance, Attachment No. 1.) Because the arbitration focused on the Company's right to alter maintenance employees' schedule, at no time during the grievance procedure, the arbitration hearing, or in post-hearing briefs did the union or company present any documentary or testimonial evidence concerning Article XI, Section 1(4), or any other part of Article XI.

Mr. Rice further states in his affidavit that the "employees in question" were historically paid overtime for all hours in excess of eight, which is consistent with the construction given by Goodstein to the agreement. It

is not disputed that these employees were paid overtime for hours "worked" in excess of eight when they were scheduled for eight and one-half continuous hours of work. However, contrary to Mr. Rice's statements in his affidavit, no employees have ever been paid for hours in excess of eight not considered "hours worked," including time spent at the plant during scheduled unpaid lunch periods.

Mr. Rice also suggests in his second affidavit that the issue of paid lunches for mechanics was decided by Arbitrator Allen, and yet the Company did not seek to modify Article XI, Section I(4), in any way. As Labor Relations Director, I was directly involved in the Allen arbitration throughout the proceeding. Article XI, Section I(4) was not the issue before Arbitrator Allen, nor was it considered at any time during that arbitration. Further, during negotiations in late December, 1990, and prior to the issuance of the Goodstein award it was agreed that Article XI, Section I(3), would be eliminated and Article XI, Section I(4) would be renumbered accordingly. The new Article XI, Section I(3) was modified and specifically speaks in terms of hours "worked." (See true and correct copy of the 1990 labor agreement, Article XI, Section I(3), Attachment No. 2.)

I have read the above and foregoing consisting of 4 pages and it is true and correct to the best of my knowledge.

/s/ Charles W. Jennings
CHARLES W. JENNINGS

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 3rd DAY
OF August, 1992

/s/ Regina M. Miller
NOTARY PUBLIC

My Commission Expires 5-13-95

ATTACHMENT NO. 1

Personnel
8133

GRIEVANCE REPORT

GRIEVANCE #89WEMT30

STEP ##1

DATE OF OCCURANCE 3/28/89

EMPLOYEES NAME All Plywood Maint Employees
PLANT W/C Plywood

DEPARTMENT W/C Maint SUPERVISOR Gordon Miller

CONTRACT VIOLATION: ARTICLE XI; XXVI; And All Applic Past Practices SECTION All

NATURE OF GRIEVANCE Re-scheduling; scheduling of all maint employee's to take a 30 minute non-paid lunch period.

SETTLEMENT DESIRED: To revert back to the previous established policy of being paid for lunch break and have no formal established time period for lunches. To be paid for time lost due to having to had to take lunch breaks.

I authorize the I.W.A., Local 5-15 as my representative to act for me in the disposition of this grievance.

DATE 3/30/89 SIGNATURE OF GRIEVANT: _____

SIGNATURE OF UNION REPRESENTATIVE: Eddie White

DATE SUBMITTED TO MANAGEMENT: 3/31/89

SIGNATURE OF MANAGEMENT _____ TITLE _____

Grievance is to be made out in TRIPLICATE. Original to management, second copy to grievance committee chairperson, third copy to Local Union Office.

COMPANY STEP ___ RESPONSE: _____

Scheduled non-work lunch periods is not a violation of the labor agreement. The requested settlement is denied.

DATE: 3/31/89 COMPANY OFFICIALS SIGNATURE: Gordon Miller

ATTACHMENT NO. 2

ARTICLE IX
SENIORITY LISTS

An up-to-date seniority list, including company seniority, will be furnished the local Union not more often than six-month intervals. The company agrees to post the seniority list issued at each facility in the break area of each plant every six (6) months. This seniority list shall not contain personal data.

ARTICLE X
WAGES

SECTION I

The hourly rates and job classifications for employees covered by this Agreement are set forth in Exhibit "A"

attached hereto, and made a part of this Agreement, and shall remain in effect throughout its life.

SECTION II

When new jobs are created or when changes in content are made which result in a substantial change in the content of existing jobs, a temporary rate of pay will be assigned to such jobs and they will be considered temporary for a maximum of sixty (60) calendar days. During this sixty (60) calendar day period the Company will conduct an evaluation of the job in question. At the completion of this evaluation, the Company will meet with the Grievance Committee which represents the job in question and fully explain the elements and results of the evaluation. The rate of pay agreed upon in this meeting shall be implemented. If a mutually satisfactory rate cannot be agreed upon, the Company will set the rate it deems appropriate and advise the Union of the date this rate became effective. The Union may, within fifteen (15) calendar days following the date of notification, file a grievance contesting this rate of pay and such grievance shall be initiated at the second step of the grievance procedures. Should a grievance not be filed within this fifteen (15) calendar day period the rate of pay shall become final and will not be subject to further review.

Any grievance referred to arbitration under this Article shall be reviewed no later than the anniversary date of this contract. If no agreement is reached, the case will be arbitrated within thirty (30) days, consistent with the arbitrators availability.

SECTION III

Those new jobs created under the provisions of Section II of Article I are not subject to the provisions of this Article nor Article VII.

ARTICLE XI
OVERTIME AND PREMIUM PAY

SECTION I

Time and one-half shall be paid for the following:

1) For all time worked in excess of forty (40) hours in any one (1) week.

2) For all hours worked on the holidays specified in this Agreement, in addition to holiday pay if so entitled.

3) For all time in excess of eight (8) hours in any one day. However, when the schedule is changed to a work day of longer than 8 hours, the employees who work this new schedule will have daily overtime computed only on those hours worked beyond the schedule. If conditions require the Company to schedule shifts for less than a 40-hour week, the Company will revert to 8-hour schedules for computing daily overtime.

For application of this Article, the work week and the twenty-four (24) hour period that is a work day, a Sunday, or a holiday shall be as designated under Article XII, Hours of Work.

SECTION II

Overtime shall be paid on a daily or weekly basis whichever is greater, but shall not be pyramided nor shall more than one basis of calculating overtime be used to cover the same hours.

SECTION III

Employees will not be rescheduled for the sole purpose of avoiding payment of overtime.

Effective Dec. 31, 1990